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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9
10 UNITED STATES OF AMERICA,
11 Plaintiff,
12 v.
13 LARRY CATES,
14 Defendant.

2:05-cr-00014-PMP-GWF

FINDINGS & RECOMMENDATIONS

15 This matter is before the Court on Defendant Larry Cates' Motion to Suppress Evidence for
16 Fourth Amendment Violation (#28), filed on January 4, 2006 and the Government's Response and
17 Opposition to Defendant's Motion to Suppress Evidence (#31), filed on January 17, 2006. The Court
18 conducted an evidentiary hearing in this matter on January 24, 2006.

19 In this case, Defendant Cates was placed under arrest by a police officer who observed him
20 urinating in a public alley in downtown Las Vegas. During a search of Defendant's person, the
21 officer discovered a loaded handgun in his inside jacket pocket. Defendant was a convicted felon and
22 he was subsequently indicted for felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1)
23 and 924 (a)(2). Defendant contends that the search of his person which revealed the handgun
24 violated the Fourth Amendment. He therefore moves to suppress the evidence of the firearm and the
25 statements allegedly made by him subsequent to the arrest as the fruits of the poisonous tree.

26 **STATEMENT OF FACTS**

27 On December 19, 2004, at approximately 3:30 p.m., Las Vegas Metropolitan Police Officers
28 Samuel Underwood and Russell Smith were on bicycle patrol in the "Downtown" area of Las Vegas,

1 Nevada. The officers were riding their bicycles southbound in an alley than runs between Main Street
2 and First Street. As the officers approached the alley on the south side of its intersection at
3 Bonneville Avenue (an east-west street), they observed Defendant Cates in the alley on the south side
4 of Bonneville Avenue. Defendant was standing in a three-sided brick enclosure that contains a
5 garbage dumpster. The height of the enclosure was approximately the same as the dumpster. The
6 rear side of this dumpster enclosure is on the eastside of the alley adjacent to an apartment building.
7 The open-side of the dumpster enclosure faces west into the alley. Officer Underwood testified that
8 ingress-egress to the apartment building on the east side of the alley is through the alley. Apartment
9 windows on the second floor of this building face the alley. Officer Underwood also testified that
10 there is an apartment building located on the west side of the alley and apartment windows in that
11 building also face the alley. There is also an adult book store located on the southwest corner of the
12 alley and Bonneville. Cars park in the rear of the adult book store adjacent to the alley. The
13 dumpster enclosure is approximately one hundred (100) feet south of Bonneville.

14 Officer Underwood testified that as he and Officer Smith approached the dumpster enclosure,
15 he observed the Defendant standing approximately two feet inside the dumpster enclosure, between
16 the dumpster and the south-side of the enclosure. Defendant's back was to the alley. Officer
17 Underwood testified that he observed Defendant urinating in the dumpster enclosure – the officer saw
18 urine falling from Defendant's body and heard the sound of the urine as it fell. He did not, however,
19 observe Defendant's genitals. Officer Underwood testified that he asked Defendant to step out of the
20 dumpster enclosure into the alley. According to Officer Underwood, Defendant asked that he be
21 permitted to finish urinating. Defendant then stepped into the alley and faced the officer. According
22 to Officer Underwood, he immediately placed Defendant under arrest by placing him in handcuffs.
23 Officer Underwood testified that it was his intention at that moment to arrest the Defendant for
24 violation of a Las Vegas City ordinance which prohibits "immodest and indecent behavior" – in this
25 case urinating in a public alley.

26 According to Officer Underwood, Defendant's conduct in urinating in the alley would have
27 been visible to persons looking out from the apartment windows overlooking the alley, or by passers-
28 by in or near the alley. Neither officer testified, however, that they were aware that any persons,

1 other than themselves, actually observed Defendant urinating. Both officers testified that while
2 working bicycle patrol in the downtown area, they frequently encounter persons urinating in public.
3 Officer Underwood testified that in ninety (90) percent of such cases, the persons are placed under
4 arrest, although they could also be issued a citation. Officer Smith also confirmed that persons
5 urinating in public are encountered with some frequency in the downtown area, and the officers
6 generally arrest these persons. Officer Underwood also testified that are there several restrooms,
7 open for use by the public, located in the downtown area which could have been used by Defendant.

8 According to Officer Underwood, upon placing the Defendant under arrest, he conducted a
9 search of Defendant's bodily incident to the arrest. During the search of Defendant's body, Officer
10 Underwood discovered a loaded .22 short caliber revolver in an inside pocket of Defendant's jacket.
11 Officer Underwood testified that Officer Smith verbally informed Defendant Cates of his Miranda
12 rights and the Defendant acknowledged that he understood his rights. According to the testimony of
13 Officer Underwood and Officer Smith, the Defendant stated that he carried the firearm for personal
14 protection. He also stated that he had a permit to carry a concealed weapon, but that he did not have
15 the paperwork on his person. Defendant also reportedly told the officers that his only prior arrest
16 was for DUI and that he had done time in the county jail in California.

17 According to the officers, Defendant later changed his story when he arrived at the Clark
18 County Detention Center and stated that the firearm did not belong to him – that he had found the
19 jacket and did not know there was a firearm in the inside pocket. A criminal records check of
20 Defendant showed that he had prior convictions for robbery in Nevada in 2000, as well as prior
21 California felony convictions. The Defendant was booked into the Clark County Detention Center on
22 charges of immodest and indecent behavior, carrying a concealed weapon, possession of an
23 unregistered firearm, possession of a firearm by an ex-felon, and obstructing a police officer by
24 providing false information. Defendant was subsequently indicted in the United States District Court,
25 District of Nevada on January 12, 2005 for the crime of Felon in Possession of a Firearm in violation
26 of 18 U.S.C. § 922(g)(1) and 924 (a)(2).

27 During the evidentiary hearing, Defendant and the Government stipulated to the admission of
28 the arrest report and attached documents as Exhibit "D". Included in Exhibit "D", is a "Property

1 Report" form that was filled out in handwriting by Officer Underwood at 4:20 p.m. on day of the
2 arrest. In the box labeled "Circumstances," Officer Underwood wrote:

3 Conducted a person stop on above suspect for urinating in the alley on a dumpster.
4 Suspect gave consent to search. Found below listed item inside his jacket pocket.

5 The item listed on the form is the .22 caliber revolver and the 6 bullets loaded therein.

6 Under cross-examination by Defendant's counsel, Officer Underwood acknowledged that he
7 was aware through his training as a police officer of the different legal standards for conducting an
8 investigatory stop or "Terry stop" versus making an arrest based on probable cause and conducting a
9 search of a suspect incident to arrest. Officer Underwood testified that in conducting a search
10 incident to arrest, it is not necessary to request or obtain the suspect's consent to search, because the
11 officer has the legal right to search the arrestee for weapons or other contraband. Officer Underwood
12 also testified to his understanding that when making an investigatory stop, based on reasonable
13 suspicion that the person may be engaged in criminal activity and armed, the permissible scope of any
14 search of the person for a weapon is more limited and the person's consent may be needed to justify a
15 search of his body. Although acknowledging that his Property Report indicates that he conducted a
16 "person stop" and obtained Defendant's consent to search, Officer Underwood testified that the
17 statements contained in the Property Report were in error. Officer Underwood testified that he, in
18 fact, immediately placed Defendant under arrest in the alley and that he searched him incident to that
19 arrest. He did not ask Defendant for consent to search him and did not obtain Defendant's consent to
20 a search.

21 Officer Smith also testified at the hearing. His recollection of the details of the incident were
22 vague. He testified, however, that as he and Officer Underwood were traveling in the alley, Officer
23 Underwood pointed out to him the Defendant who was urinating in the dumpster enclosure. Both
24 officers approached the Defendant and Officer Underwood placed Defendant in handcuffs and
25 proceeded to conduct a search of his person. After the search revealed the handgun in Defendant's
26 coat pocket, Officer Smith informed Defendant of his Miranda Rights, which Defendant stated he
27 understood. Officer Smith, who prepared the written arrest report, confirmed the testimony of
28 Officer Underwood that the search of Defendant's person was made incident to the arrest for

1 immodest and indecent behavior.

2 **DISCUSSION**

3 The Fourth Amendment secures “the right of the people to be secure in their persons, houses,
4 papers and effects against unreasonable searches and seizures.” U.S. Const. Amend. IV. The Fourth
5 Amendment protects reasonable and legitimate expectations of privacy. *Katz v. United States*, 389
6 U.S. 347 (1967). The Fourth Amendment protects “people not places.” *Id.* Evidence obtained in
7 violation of the Fourth Amendment, and evidence derived from it, may be suppressed as the “fruit of
8 the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471 (1963).

9 Defendant’s Motion to Suppress (#28) views the circumstances of the search and seizure in
10 this case as falling under the constitutional standard applicable to investigatory stops of individuals in
11 which the court must determine whether the officer had reasonable suspicion that the person was
12 engaged in, or about to engage in, dangerous criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 88
13 S.Ct. 1868 (1968). Where an officer has reasonable suspicion that a person may be engaged in
14 dangerous criminal activity and may be armed, the officer may briefly detain the person and conduct a
15 “pat-down” search of his body for the presence of a weapon. Defendant argues that the police
16 officers in this case lacked reasonable suspicion to believe that Defendant was engaged in, or about to
17 engage in, dangerous criminal activity and therefore the search violated the Fourth Amendment.

18 The Government argues, however, that the officers detained and arrested the Defendant based
19 on probable cause to believe he had committed a crime, urinating in a public alley in violation of a Las
20 Vegas city ordinance. The Government, therefore argues, that the search of Defendant’s person, was
21 a search incident to arrest and is not governed by the *Terry* principles applicable to investigatory
22 stops.

23 Police officers may execute warrantless searches incident to a lawful arrest and search an
24 arrestee and the area within his immediate control for weapons that might threaten the officer’s
25 safety, or evidence of a crime that might be hidden or destroyed. *Chimel v. California*, 395 U.S. 752,
26 762-63, 89 S.Ct. 2034 (1969); *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 2132
27 (2004); *United States v. Kincade*, 379 F.3d 813, 822 (2004); *United States v. Osife*, 398 F.3d 1143,
28 1145 (9th Cir. 2005).

1 As the Ninth Circuit recently noted in *United States v. Osife, supra*:

2 “In *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973),
 3 the Court made clear that courts are *not* to decide on a case-by-case basis whether the
 4 officers’ safety is in jeopardy or whether evidence is in danger of destruction. *Id.*, at
 5 234, 94 S.Ct. 467. Rather, the Court explained, *Chimel* laid down a bright-line rule: a
 6 search of the arrestee’s person and the area within his reach is *per se* reasonable and
 7 permissible under the Fourth Amendment. *Id.*

8 398 F.3d at 1145.

9 In *Osife*, the defendant parked his pickup truck in the parking lot of a grocery store. He
 10 urinated on ground next to his truck and then walked into the store. A woman standing in the
 11 parking lot observed defendant’s conduct and called the police. The officers came to the scene and
 12 observed the pool of fluid next to the driver’s door of defendant’s truck. Defendant came out of the
 13 store and went to his truck. As the defendant opened the truck door, one of the officers saw him take
 14 a plastic bag from his pocket and place it in the truck. The officer approached defendant and told him
 15 about the report of his public urination, which defendant denied. A few minutes later, the woman
 16 who had called the police, returned to the area and told the officers that defendant was the person she
 17 had seen urinating by the truck. The officer thereupon placed defendant under arrest for indecent
 18 exposure, handcuffed him and placed him in the police car. The police then conducted a search of the
 19 cab of the pick-up truck and found a .40 caliber pistol underneath a plastic bag on the seat.
 20 Defendant, a previously convicted felon, was thereafter charged and convicted of being a felon in
 21 possession of a firearm in violation of 18 U.S.C. § 922(g)(1).

22 The defendant in *Osife* did not challenge the validity of his arrest for indecent exposure, but
 23 argued that the police exceeded the permissible scope of their right to search his vehicle because there
 24 was no reasonable suspicion that he was armed given the nature of the offence for which he was
 25 arrested and because he was not in the vicinity of the vehicle at the time of the search. The court
 26 rejected these arguments based on *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981) and
 27 *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 2132 (2004).

28 In this case, both Officer Underwood and Officer Smith testified that they observed Defendant
 29 Cates urinating next the dumpster in the alley. Neither officer had any suspicion that Defendant was
 30 engaged in, or about to engage in, other criminal activity or that Defendant was armed. Both officers

1 testified that the decision was immediately made to arrest Defendant Cates pursuant to an applicable
2 city ordinance based on his conduct in urinating in the alley. Defendant's counsel attempted to cast
3 doubt on the reason or grounds for the officer's search of Defendant based on Officer Underwood's
4 statement in the "Property Report" that he conducted a "person stop" on Defendant for urinating in
5 the alley and that Defendant gave consent to the search. Officer Underwood testified, however, that
6 the statement in his "Property Report" that Defendant gave his consent to search was in error, and
7 that he never requested, nor did Defendant grant, permission to search his person. Officer
8 Underwood reiterated that the search of Defendant was conducted incident to his arrest.

9 The handwritten and dictated Arrest Reports prepared by Officer Smith state that Defendant
10 was placed under arrest for "Immodest and Indecent Behavior" and the search was made incident to
11 that arrest. Exhibit "D". Nothing in the Arrest Reports or in the officers' testimony suggests that the
12 officers were suspicious that Defendant was engaged in other criminal activity or that his consent to
13 search his person was either requested or obtained. No evidence was introduced at the hearing to
14 contradict the officers' testimony that Defendant was, in fact, urinating in the alley.

15 To the extent that Defendant argues or implies that the arrest was a pretext for conducting a
16 body search based the officer's inchoate suspicion that Defendant might be armed or have contraband
17 in his possession, the Court must reject such an assertion. So long as the officers had probable cause
18 to believe that Defendant had committed a violation of law for which he was subject to arrest, the
19 officers' search of his person did not violate the Fourth Amendment. *Whren v. United States*, 517
20 U.S. 806, 116 S.Ct. 1769 (1996).

21 Whether a state law enforcement officer has authority to make an arrest is ordinarily
22 determined by state law. *Ker v. California*, 374 U.S. 23, 37, 83 S.Ct. 1623 (1963); *United States v.*
23 *Shepard*, 21 F.3d 933, 936 (9th Cir. 1994). Nevada Revised Statute (NRS) 171.124.1(a) states that a
24 peace officer may, without a warrant, arrest a person for a public offense committed or attempted in
25 his presence. The evidence presented at the hearing establishes that the officers observed Defendant
26 urinating in the alley. Las Vegas City Ordinance § 10.40.040 states:

27 Immodest, improper, or indecent behavior upon any public street, alley or highway of
28 the City or in any place within the City to which the public is invited is prohibited.
Any person who violates this Section is guilty of a misdemeanor. (Amended at City's

1 request, letter of 4-11-83; Ord. 6 § 2, 1911; prior code § 6-1-18).

2 Defendant has not contested that his conduct in urinating in the alley violated the foregoing
 3 city ordinance. Other state courts have held that urinating in a public place is conduct sufficient to
 4 constitute a violation of similar statutes or ordinances. *People v. Cooke*, 578 N.Y.S.2d 76, 77-78
 5 (J.Ct. N.Y. 1991) (urinating in a public place may constitute disorderly conduct under a local town
 6 ordinance); *State v. Villarreal*, 984 P.2d 1064, 1067 (Wash.App. 1999) (urinating in public place may
 7 be found to violate ordinances prohibiting vulgar, profane or obscene conduct or disposal of offensive
 8 or nauseous substances); *State v. Cherry*, 173 N.W.2d 887 (Neb. 1970) (urinating in public could
 9 constitute ‘indecent behavior’ under a municipality’s disorderly conduct ordinance.)

10 In this case, the officers testified that the alley between Main Street and First Street is a public
 11 alley and, therefore, within the scope of Las Vegas City Ordinance § 10.40.040. Defendant’s location
 12 in the alley where he was urinating was visible from the apartment windows on both sides of the alley
 13 and to persons passing through the alley or traveling on the adjacent public street, Bonneville Ave.
 14 The officers testified that they observed Defendant urinating as they approached him. The officers
 15 also indicated that there were restrooms open to the public in the general vicinity of where Defendant
 16 was located which he could have used instead of urinating in the alley. Under these circumstances,
 17 the officers had probable cause to arrest Defendant for violation of the ordinance.

18 **CONCLUSION**

19 Based on the foregoing, the Court finds that the police officers had probable cause to arrest
 20 Defendant Cates for violation of Las Vegas City Ordinance § 10.40.040. Incident to that arrest, the
 21 officers were legally entitled to search Defendant’s person for weapons or contraband. The search of
 22 the Defendant’s person and the discovery of the handgun in his inside coat pocket, therefore, did not
 23 violate the Fourth Amendment. Therefore, for good cause shown,

24 **IT IS HEREBY RECOMMENDED** that Defendant’s Motion to Suppress Evidence for
 25 Fourth Amendment Violation (#28) should be **DENIED**.

26 DATED this 26th day of January, 2006.

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GEORGE FOLEY, JR.
 UNITED STATES MAGISTRATE JUDGE